

CALIFORNIA CONSUMER ATTORNEYS, P.C.

Michael H. Rosenstein (SBN 169091)

mhr@calattorneys.com

Sepehr Daghigian (SBN 239349)

sd@calattorneys.com

James P. Martinez (SBN 308806)

James P. Martinez (SBN
jpm@calattorneys.com)

10866 Wilshire Blvd. Suite 1200

10600 Wilshire Blvd, Ste
Los Angeles, CA 90024

Los Angeles, CA 90024
Telephone: (310) 872-26

Telephone: (310) 872-2000
Facsimile: (310) 730-7377

Facsimile: (310) 750-7577

Attorneys for Plaintiff,
JOSE L. MENDOZA

JOSE L. MENDOZA

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOSE L. MENDOZA, an individual,

Plaintiff,

VS.

BMW OF NORTH AMERICA, LLC, a
Delaware Limited Liability Company ,
and DOES 1 through 10, inclusive,

Defendants.

Case No.: _____

COMPLAINT

1. **VIOLATION OF SONG-BEVERLY ACT - BREACH OF EXPRESS WARRANTY**
2. **VIOLATION OF SONG-BEVERLY ACT - BREACH OF IMPLIED WARRANTY**
3. **VIOLATION OF THE SONG-BEVERLY ACT SECTION 1793.2(b)**

1 Plaintiff, JOSE L. MENDOZA, an individual, alleges as follows against
 2 Defendants BMW OF NORTH AMERICA, LLC, a Delaware Limited Liability
 3 Company (“BMW of North America, LLC”), and DOES 1 through 10 inclusive, on
 4 information and belief, formed after a reasonable inquiry under the circumstances:

5 **DEMAND FOR JURY TRIAL**

6 1. Plaintiff, Jose L. Mendoza, hereby demands trial by jury in this action.

7 **JURISDICTION AND VENUE**

8 2. This Court has jurisdiction over the subject matter and parties pursuant to
 9 28 U.S.C. § 1332 *et seq.*, because amount of recovery sought by Plaintiff exceeds the
 10 jurisdictional amount of \$75,000.00, and there is complete diversity amongst the
 11 parties.

12 3. The Subject Vehicle, as reflected in the sales contract, has an approximate
 13 value of \$60,688.01 (**Exhibit “A”**) Pursuant to the Song-Beverly Act, Plaintiff is
 14 seeking general, special, and actual damages, as well as civil penalties, up to two times
 15 the amount of actual damage. As such, Plaintiff seeks in the approximate amount of
 16 \$182,064.03. Plaintiff is also seeking reasonable attorneys’ fees under the Act.
 17 Accordingly, Plaintiff claims meets the jurisdictional threshold required under 28
 18 U.S.C. § 1332 (a).

19 4. Complete diversity exists as Plaintiff, JOSE L. MENDOZA, an individual,
 20 is citizen of the State of California.

21 5. With respect to Defendant, BMW of North America, LLC, the citizenship
 22 of limited liability company for diversity jurisdiction purposes is determined by
 23 examining the citizenship of each member of the company. *Johnson v. Columbia*
 24 *Properties Anchorage, LP*, 437 F.3d 894, 899-900 (9th Cir. 2006); *Rolling Greens*
 25 *MHP, L.P. v. Comcast SCH Holdings, LLC*, 374 F.3d 1020, 1021-22 (11th Cir. 2004).
 26 Moreover, a member of a limited liability company is a person who has been admitted
 27 to a limited liability company as a member. *See* Cal. Corp. Code § 17701.02, subd.
 28

(p.); 6 Del. Code § 18-101, subd. (13); 6 Del. Code §§ 18-301 et seq.

6. Defendant, BMW of North America, LLC, is a Delaware Limited Liability Company operating and doing business in the State of California. As reflected within Defendant's Statement of Information filed with the California Secretary of State, none of the individual members listed within are citizens of the state of California. Rather, the Statement of Information expressly indicates a Georgia address for each listed member. Accordingly, the members of BMW of North America, LLC are citizens of the state of Georgia and not California, as reflected within Section D of the Statement of Information, filed by Defendant on December 04, 2020. A true and correct copy of Defendant, BMW of North America, LLC's Statement of Information is attached herewith as **Exhibit “B.”**

7. As such, none of Defendant's members, as a limited liability company, is a citizen of the state of California. Accordingly, there is complete diversity amongst the parties under 28 U.S.C. § 1332. (a) (1), as Plaintiff has now alleged sufficient facts to establish subject matter jurisdiction.

8. Venue is proper in, and Defendants are subject to the personal jurisdiction of, this court because the Subject Vehicle was purchased at Stevens Creek BMW, a BMW of North America, LLC authorized dealership and repair facility, located in 4343 Stevens Creek Blvd, Santa Clara, CA 95051.

9. Venue is also proper, as Plaintiff, Jose L. Mendoza, is an individual residing in the City of Rodeo, State of California.

10. Venue is also proper, as Defendant, BMW of North America, LLC, is and was a Delaware Limited Liability Company operating and doing business in the State of California.

GENERAL ALLEGATIONS

11. Plaintiff, Jose L. Mendoza, is an individual residing in the City of Rodeo, State of California.

1 12. Defendant BMW of North America, LLC is and was a Delaware Limited
2 Liability Company operating and doing business in the State of California.

3 13. These causes of action arise out of the warranty obligations of BMW of
4 North America, LLC in connection with a vehicle purchased by Plaintiff and for which
5 BMW of North America, LLC issued a written warranty.

6 14. Plaintiff does not know the true names and capacities, whether corporate,
7 partnership, associate, individual or otherwise of Defendant issued herein as Does 1
8 through 10, inclusive, under the provisions of section 474 of the California Code of
9 Civil Procedure. Defendant Does 1 through 10, inclusive, are in some manner
10 responsible for the acts, occurrences and transactions set forth herein, and are legally
11 liable to Plaintiff. Plaintiff will seek leave to amend this Complaint to set forth the
12 true names and capacities of the fictitiously named Defendant, together with
13 appropriate charging allegations, when ascertained.

14 15. All acts of corporate employees as alleged were authorized or ratified by
15 an officer, director, or managing agent of the corporate employer.

16 16. Each Defendant, whether actually or fictitiously named herein, was the
17 principal, agent (actual or ostensible), or employee of each other Defendant, and in
18 acting as such principal or within the course and scope of such employment or agency,
19 took some part in the acts and omissions hereinafter set forth by reason of which each
20 Defendant is liable to Plaintiff for the relief prayed for herein.

21 17. On April 17, 2021, Plaintiff purchased a new 2020 BMW X3, having
22 VIN No. 5UXTS1C02L9D29745 ("the Subject Vehicle"). Express warranties
23 accompanied the sale of the Subject Vehicle to Plaintiff by which BMW of North
24 America, LLC undertook to preserve or maintain the utility or performance of
25 Plaintiff's vehicle or to provide compensation if there was a failure in such utility or
26 performance.

27 18. The Subject Vehicle was delivered to Plaintiff with serious defects and
28 nonconformities to warranty and developed other serious defects and nonconformities

1 to warranty including, but not limited to, the engine defects, transmission system
2 defects, fuel system defects, engine electronics system defects, electrical defects, and
3 other serious nonconformities to warranty.

4 19. Plaintiff hereby revokes acceptance of the sales contract.

5 20. Pursuant to the Song-Beverly Consumer Warranty Act (herein after the
6 "Act") Civil Code sections 1790 *et seq.* the Subject Vehicle constitutes "consumer
7 goods" used primarily for family or household purposes, and Plaintiff has used the
8 vehicle primarily for those purposes.

9 21. Plaintiff is a "buyer" of consumer goods under the Act.

10 22. Defendant BMW of North America, LLC is a "manufacturer" and/or
11 "distributor" under the Act.

12 23. To the extent that one or more class action lawsuits have been filed or are
13 filed with respect to the nonconformities affecting Plaintiff's vehicle, without
14 conceding the necessity of supplying such notice, Plaintiff hereby provides notice to
15 Defendant and/or Defendant's agents of Plaintiff's intent to opt-out and be excluded
16 from the settlement class of said class action lawsuit(s).

17 24. Plaintiff hereby demands trial by jury in this action.

18 **FIRST CAUSE OF ACTION**

19 **Violation of the Song-Beverly Act – Breach of Express Warranty**

20 16. Plaintiff incorporates herein by reference each and every allegation
21 contained in the preceding and succeeding paragraphs as though herein fully restated
22 and re-alleged.

23 17. Express warranties accompanied the sale of the vehicle to Plaintiff by
24 which BMW of North America, LLC undertook to preserve or maintain the utility or
25 performance of Plaintiff's vehicle or to provide compensation if there was a failure in
26 such utility or performance.

27 18. The Subject Vehicle was delivered to Plaintiff with serious defects and
28 nonconformities to warranty and developed other serious defects and nonconformities

1 to warranty including, but not limited to, the engine defects, transmission system
2 defects, fuel system defects, engine electronics system defects, electrical defects, and
3 other serious nonconformities to warranty.

4 19. Pursuant to the Song-Beverly Consumer Warranty Act (herein after the
5 "Act") Civil Code sections 1790 *et seq.* the vehicle constitutes "consumer goods" used
6 primarily for family or household purposes, and Plaintiff has used the Subject Vehicle
7 primarily for those purposes.

8 20. Plaintiff is the "buyer" of consumer goods under the Act.

9 21. Defendant BMW of North America, LLC is a "manufacturer" and/or
10 "distributor" under the Act.

11 22. The foregoing defects and nonconformities to warranty manifested
12 themselves in the Subject Vehicle within the applicable express warranty period. The
13 nonconformities substantially impair the use, value and/or safety of the vehicle.

14 23. Plaintiff delivered the vehicle to an authorized BMW of North America,
15 LLC repair facility for repair of the nonconformities.

16 24. Defendant was unable to conform Plaintiff's vehicle to the applicable
17 express after a reasonable number of repair attempts.

18 25. Notwithstanding Plaintiff's entitlement, Defendant BMW of North
19 America, LLC has failed to either promptly replace the new motor vehicle or to
20 promptly make restitution in accordance with the Song-Beverly Act.

21 26. By failure of Defendant to remedy the defects as alleged above, or to
22 issue a refund or replacement vehicle, Defendant is in breach of its obligations under
23 the Song-Beverly Act.

24 27. Under the Act, Plaintiff is entitled to reimbursement of the price paid for
25 the vehicle less that amount directly attributable to use by the Plaintiff prior to the first
26 presentation of the nonconformities.

27 28. Plaintiff is entitled to all incidental, consequential, and general damages
28 resulting from Defendant's failure to comply with its obligations under the Song-

1 Beverly Act.

2 29. Plaintiff is entitled under the Song-Beverly Act to recover as part of the
 3 judgment a sum equal to the aggregate amount of costs and expenses, including
 4 attorney's fees, reasonably incurred in connection with the commencement and
 5 prosecution of this action.

6 30. Because Defendant willfully violated the Song-Beverly Act, Plaintiff is
 7 entitled in addition to the amounts recovered, a civil penalty of up to two times the
 8 amount of actual damages for BMW of North America, LLC's willful failure to
 9 comply with its responsibilities under the Act.

10 **SECOND CAUSE OF ACTION**

11 **Violation of the Song-Beverly Act – Breach of Implied Warranty**

12 31. Plaintiff incorporates herein by reference each and every allegation
 13 contained in the preceding and succeeding paragraphs as though herein fully restated
 14 and re-alleged.

15 32. BMW of North America, LLC and its authorized dealership at which
 16 Plaintiff purchased the Subject Vehicle had reason to know the purpose of the Subject
 17 Vehicle at the time of sale of the Subject Vehicle. The sale of the Subject Vehicle
 18 was accompanied by implied warranties provided for under the law.

19 33. Among other warranties, the sale of the Subject Vehicle was
 20 accompanied by an implied warranty that the Subject Vehicle was merchantable
 21 pursuant to Civil Code section 1792.

22 34. The Subject Vehicle was not fit for the ordinary purpose for which such
 23 goods are used because it was equipped with one or more defective vehicle
 24 systems/components.

25 35. The Subject Vehicle did not measure up to the promises or facts stated
 26 on the container or label because it was equipped with one or more defective vehicle
 27 systems/components.

28 36. The Subject Vehicle was not of the same quality as those generally

1 acceptable in the trade because it was sold with one or more defective vehicle
2 systems/components which manifest as the engine defects, transmission system
3 defects, fuel system defects, engine electronics system defects, electrical defects, and
4 other serious nonconformities to warranty.

5 37. Upon information and belief, the defective vehicle systems and
6 components were present at the time of sale of the Subject Vehicle; thus, extending
7 the duration of any implied warranty under *Mexia v. Rinker Boat Co., Inc.* (2009) 174
8 Cal.App.4th 1297, 1304–1305 and other applicable laws.

9 38. Plaintiff is entitled to justifiably revoke acceptance of the Subject Vehicle
10 under Civil Code, section 1794, *et seq*;

11 39. Plaintiff hereby revokes acceptance of the Subject Vehicle.

12 40. Plaintiff is entitled to replacement or reimbursement pursuant to Civil
13 Code, section 1794, *et seq*.

14 41. Plaintiff is entitled to rescission of the contract pursuant to Civil Code,
15 section 1794, *et seq*. and Commercial Code, section 2711.

16 42. Plaintiff is entitled to recover any incidental, consequential, and/or
17 “cover” damages under Commercial Code, sections 2711, 2712, and Civil Code,
18 section 1794, *et seq*.

THIRD CAUSE OF ACTION

Violation of the Song-Beverly Act Section 1793.2(b)

21 43. Plaintiff incorporates herein by reference each and every allegation
22 contained in the preceding and succeeding paragraphs as though herein fully restated
23 and re-alleged.

24 44. Pursuant to Civil Code, section 1793.2, subdivision (a) a manufacturer
25 that sells consumer goods in California, for which it has made an express warranty,
26 shall maintain service and repair facilities or designate and authorize independent
27 service and repair facilities to carry out the terms of those warranties.

28 45. Pursuant to Civil Code, section 1793.2, subdivision (b), when service and

1 repair of goods is necessary because they do not conform with the applicable express
2 warranties, service and repair shall be commenced within a reasonable time by the
3 manufacturer or its representative.

4 46. Civil Code, section 1793.2, subdivision (b) further states that goods shall
5 be serviced or repaired so as to conform to the applicable warranties within 30 days
6 and/or within a reasonable time.

7 47. The sale of the Subject Vehicle was accompanied by express warranties,
8 including a warranty guaranteeing that the Subject Vehicle was safe to drive and not
9 equipped with defective parts, including the electrical system.

10 48. Plaintiff delivered the Subject Vehicle to BMW of North America,
11 LLC's authorized service representatives on multiple occasions. The Subject Vehicle
12 was delivered for repairs of defects, which amount to a nonconformities to the express
13 warranties that accompanied the sale of the Subject Vehicle.

14 49. Defendant's authorized facilities did not conform the Subject Vehicle to
15 warranty within 30-days and/or commence repairs within a reasonable time and BMW
16 of North America, LLC has failed to tender the Subject Vehicle back to Plaintiff in
17 conformance with its warranties within the timeframes set forth in Civil Code section
18 1793.2(b).

19 50. Plaintiff is entitled to justifiably revoke acceptance of the Subject Vehicle
20 under Civil Code, section 1794, *et seq*;

21 51. Plaintiff hereby revokes acceptance of the Subject Vehicle.

22 52. Plaintiff is entitled to replacement or reimbursement pursuant to Civil
23 Code, section 1794, *et seq*.

24 53. Plaintiff is entitled to rescission of the contract pursuant to Civil Code
25 section 1794, *et seq*. and Commercial Code, section 2711.

26 54. Plaintiff is entitled to recover any "cover" damages under Commercial
27 Code sections 2711, 2712, and Civil Code, section 1794, *et seq*.

28 55. Plaintiff is entitled to recover all incidental and consequential damages

1 pursuant to 1794 *et seq* and Commercial Code sections, 2711, 2712, and 2713 *et seq*.

2 56. Plaintiff is entitled in addition to the amounts recovered, a civil penalty
3 of up to two times the amount of actual damages in that BMW of North America, LLC
4 has willfully failed to comply with its responsibilities under the Act.

5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff prays for judgment against Defendants, as follows:

7 1. For general, special and actual damages according to proof at trial in
8 excess of \$75,000;

9 2. For rescission of the purchase contract and restitution of all monies
10 expended;

11 3. For diminution in value;

12 4. For incidental and consequential damages according to proof at trial;

13 5. For civil penalty in the amount of two times Plaintiff's actual damages;

14 6. For prejudgment interest at the legal rate;

15 7. For reasonable attorney's fees and costs and expenses of suit; and

16 8. For such other and further relief as the Court deems just and proper under
17 the circumstances.

18 Dated: October 13, 2022

19 **CALIFORNIA CONSUMER ATTORNEYS,
P.C.**

20 /s/ Sepehr Daghighian

21 Michael H. Rosenstein, Esq.
22 Sepehr Daghighian, Esq.
23 James P. Martinez, Esq.
24 Attorneys for Plaintiff,
JOSE L. MENDOZA

25 Plaintiff, **JOSE L. MENDOZA**, hereby demands trial by jury in this action.